

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

R. FRANCIS DiPRETE,)
)
Plaintiff,) Case No. 1:15CV00034
)
v.) **OPINION AND ORDER**
)
950 FAIRVIEW STREET, LLC, ET AL.,) By: James P. Jones
) United States District Judge
Defendants.)

R. Francis DiPrete, Pro Se Plaintiff; R. Lucas Hobbs, Elliot Lawson & Minor, P.C., Bristol, Virginia, for Defendant Michael Cosola.

In this contractual dispute, defendant Michael Cosola has moved to dismiss the Complaint against him for failure to state a claim. I previously ruled on two similar motions — the first was a motion to dismiss filed by defendants Michael Stramiello and 950 Fairview Street, LLC (ECF No. 30), the second was a motion for a more definite statement filed by Cosola (ECF No. 40). My analysis of the present motion is largely the same as my analysis of those two motions.

Cosola argues that he should be dismissed because the written consulting agreement that the plaintiff attached to his Complaint does not mention Cosola. However, there is no question that the written agreement was never signed by the parties. The plaintiff alleges that the parties nonetheless entered into a contract by virtue of their later conduct. (Comp. ¶¶ 17, 18, ECF No. 1.) The plaintiff further

alleges that Cosola benefitted from this contract because he is the owner of the property that was improved by the contract. (Comp. ¶¶ 6,7, ECF No. 1.)

The plaintiff did not automatically refute his own allegations by attaching the written agreement to his Complaint. While the written agreement is relevant evidence of the alleged contract's terms, that written document does not necessarily control those terms because it was never executed. Cosola is free to argue during later stages of the case that the writing evidences that he was not a party to the contract, but at this early stage, the writing does not provide an appropriate basis for dismissal.

Cosola also asks me to dismiss the plaintiff's claim for "bad faith breach," but that claim has already been dismissed against all of the defendants.

For the foregoing reasons, it is **ORDERED** that defendant Cosola's Motion to Dismiss (ECF No. 42) is DENIED.

DATED: June 8, 2016

/s/ James P. Jones
United States District Judge